Office-Supreme Court, U.S.
FILED
OCT 20 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1961

No. [redacted] 198

JOSEPH PAGANO,

Petitioner,

against

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD L. LIPTON,
Attorney for Respondent.

Of Counsel to:
BOOTH, LIPTON & LIPTON,
Attorneys for Trustee-Respondent,
292 Madison Avenue,
New York 17, N. Y.

Of Counsel on Brief:
EDGAR H. BOOTH,
292 Madison Avenue,
New York 17, N. Y.

INDEX

	PAGE
Questions Presented	1
Summary of Argument	2
Statement of Facts Material to the Questions Presented	2
POINT I—Jurisdiction on a petition for a writ of certiorari is discretionary and should be exercised sparingly and with great caution	9
POINT II—The decision of the courts below that the Referee had summary jurisdiction does not conflict with the decisions of this Court	11
POINT III—The turnover order was properly granted with respect to petitioner and is in conformity with the decisions of this Court	16
POINT IV—Inferences may properly be drawn against petitioner from his failure to testify as to facts within his control	21
CONCLUSION	30

Cases Cited

American Const. Co. v. Jacksonville Ry., 148 U. S. 372 (1892)	10
Arndstein v. McCarthy, 254 U. S. 71 (1920)	21
Binderup v. Pathe Exchange, 263 U. S. 291	13
Board of Edueation v. Leary, 236 Fed. 521 (8th Cir. 1916)	13
Bradley v. O'Hare, 2 A. D. 2d 436, 156 N. Y. S. 2d 533 (1st Dept. 1956)	26
Brown v. United States, 356 U. S. 148 (1948)	22, 23
Chavkin, In re, 249 Fed. 342 (2d Cir. 1918)	27
Clifton v. United States, 45 U. S. (4 How.) 242 (1846)	29

PAGE

Cline v. Kaplan, 323 U. S. 97 (1944) 13
Commissioner v. Bilder, 369 U. S. 499 (1962) 10
Commonwealth v. Webster, 5 Cush. 295 25
Cooper v. Dasher, 290 U. S. 106 18
Counselman v. Hitchcock, 142 U. S. 547 (1892) 21

DiBella v. United States, 369 U. S. 121 (1962) 10
Dittmar v. Michelson, 281 Fed. 116 (3rd Cir. 1922), cert. den. 260 U. S. 738 (1922) 28

Farmers & Mechanics National Bank v. Wilkinson, 266 U. S. 503 18
Fields v. United States, 205 U. S. 292 (1907) 10
Forsyth v. Hammond, 166 U. S. 506 (1897) 10
Fross v. Wotton, 3 Cal. 2d 384, 44 P. 2d 684 (1935) 26

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175 (1938) 11

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251 (1916) 9, 10
Hansel v. Purnell, 1 F. 2d 266 (6th Cir. 1924) 25
Harris v. Chamberlin, 271 U. S. 191 (1925) 12, 13
Haywood v. Craig Colony, 7 A. D. 2d 69, 180 N. Y. S. 2d 701 (dissent) (4th Dept. 1958) 26
H. Magen Co., In re, 10 F. 2d 91 (2d Cir. 1925) 27

Ikeda v. Curtis, 43 Wash. 2d 449, 261 P. 2d 684 (1953) 26

Kattelman v. Madden, 88 F. 2d 858 (8th Cir. 1937) 28
Keller v. Adams Campbell Co., 264 U. S. 314 (1924) 11

Lau Ow Bew, Petitioner, 141 U. S. 583 (1891) 10
Lau Ow Bew v. United States, 144 U. S. 47 (1892) 10
Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387 (1923) 11
Levine v. Bornstein, 13 Misc. 2d 161, 174 N. Y. S. 2d 574 (Sup. Kings 1958) 26

Maggio v. Zeitz, 333 U. S. 56 (1948) 17, 18, 19, 20, 21
Mammoth Oil Co. v. United States, 275 U. S. 13 (1927) 25, 26, 29

PAGE

Milgrom, In re, 94 F. Supp. 282 (D. C. S. D. N. Y. 1950) 20
Moore v. New York Cotton Exchange, 270 U. S. 593 13
Muncie Gear Works, Inc. v. Outboard, Marine & Manufacturing Co., 315 U. S. 759 (1942) 10
Northern Railway Company v. Page, 274 U. S. 65 26
Oriel v. Russell, 278 U. S. 358 (1929) 16, 17, 18
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70 (1955) 11
St. Regis Paper Co. v. United States, 368 U. S. 208 (1961) 10
Sheinman v. Chalmers, 33 F. 2d 902 (3d Cir. 1929) .. 27, 28
Simson v. Granquist, 369 U. S. 38 (1962) 10
Stavrahn, In re, 174 Fed. 330 (2d Cir. 1909) 27
United States v. St. Pierre, 132 F. 2d 837 (2d Cir. 1942) 23, 24
United States v. Union Central Life Ins. Co., 368 U. S. 291 (1961) 10
Vitemb, In re, 120 F. Supp. 830 (D. C. S. D. Tex. 1954) 20
Walder v. United States, 347 U. S. 62 (1954) 23
Warner v. New Orleans, 167 U. S. 467 (1897) 9
Woods, In re, 143 U. S. 202 (1892) 10

Other Authorities

VIII Wigmore, Evidence, § 2272, p. 439 (4th Ed., McNaughton Rev. 1961) 24
Revised Rules of the Supreme Court of the United States, Rule 19(1) 10

Statutes Cited

28 U. S. C. § 1254(1) 9
11 U. S. C. § 47c 9

Supreme Court of the United States

October Term, 1961

No. 1058

JOSEPH PAGANO,

Petitioner,

against

MILTON E. SAHN, as Trustee in Bankruptcy of MURRAY PACKING CO. INC., Bankrupt,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

The questions presented are:

1. Whether the Referee in Bankruptcy below had summary jurisdiction to hear and determine the motion for a turnover order against the petitioner and to grant the turnover order in question.

2. Whether the order directing the petitioner to turn over to respondent the sum of $745,000 was properly granted upon the facts at issue.

3. Whether any inferences drawn by the trier of fact from petitioner's failure to rebut evidence adverse to him by a claim to constitutional privilege against self-incrimination were proper under the facts and circumstances of the proceedings below.

Summary of the Argument

The discretionary jurisdiction of this Court, on a petition for writ of certiorari should not be exercised in this cause because the decision of the court below does not conflict with the decisions of other courts of appeals or of this Court and no important question of federal law is presented, which has not been, but should be, settled by this Court.

The determination of the court below, that the Referee had summary jurisdiction to grant the turnover motion, was in conformity with the decisions of this Court.

The determination of the court below, that the Referee properly granted the turnover motion, also was in conformity with the decisions of this Court and does not present a novel or important question that has not been, and should be, settled by this Court.

Any inferences that were drawn from petitioner's failure to testify as to facts within his control in this civil cause, by reason of his claim of the Constitutional privilege, were proper and in conformity with the decisions of this Court.

Statement of Facts Material to the Questions Presented

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that court, made and entered on April 25, 1962, reversing an order of the District Court for the Southern District of New York, which, in turn, reversed an order of the Referee in Bankruptcy below which directed the petitioner, Joseph Pagano, to turn over the sum of $745,000, representing monies taken by him fro[illegible] the bank account of Murray Packing Co. Inc. by the [illegible]ishing of checks over a period of ten days in March 1961, which the

Referee found Pagano was holding without any claim or color of title.

The brief summary of the facts at issue in the petition for the writ sought herein does not present the case in its full flavor. Murray Packing Co. Inc., the bankrupt herein, a New York corporation, was engaged in the business of wholesale sale of meats and poultries (app., p. 90a).*

Joseph Pagano, the petitioner, first became associated with an affiliated company of the bankrupt in March of 1960 as a salesman (38a, 39a). In January, 1961 he purported to purchase one-third of the outstanding capital stock of the bankrupt, and became its President (16a). At the time, Stanley Weinberg was Secretary-Treasurer of the bankrupt and continued to hold this office. Prior to January, 1961, the bankrupt's purchases of merchandise from suppliers had averaged approximately $100,000 per week. Thereafter, under Pagano's direction, the bankrupt's purchases of merchandise increased so astronomically that its liabilities were almost $1,300,000 on or about April 11, 1961, the date when the involuntary petition in bankruptcy was filed (55a). Most of the increased amount of merchandise purchased by the bankrupt was sold by it to corporations or firms that Pagano brought in as customers (56a, 66a).

The bankrupt had maintained its corporate bank account at the Royal State Bank of New York. On March 22, 1961, another corporate bank account was opened at the Commercial Bank of North America by Messrs. Pagano and Weinberg (62a). This was the same bank and the same branch where the major customer brought in by Pagano maintained its bank account (57a, 65a). The only purpose for opening the new account at the Commercial

* All references are to pages in Respondent's Appendix below, unless otherwise indicated.

Bank of North America was to permit credit to be established so that the bankrupt could draw almost instantaneously against payments received in the form of checks, most of which were certified, from the particular customer to whom substantially all the additional merchandise was being sold (57a, 65a). The new account was opened because Royal State Bank, after one episode of check cashing, refused to permit them to draw against uncollected funds, even in the form of certified checks, or to cash checks drawn against such deposits.

The acts complained of, the bold conscienceless looting of a corporate treasury which became the subject matter of the turnover proceedings, took place between March 20, 1961 and March 29, 1961 (93a). During that period of ten days a total of $745,000 was withdrawn from the two corporate bank accounts by corporate checks issued to the order of Joseph Pagano, signed by Pagano and Weinberg on behalf of the bankrupt and cashed at the bank (7a, 9a). These withdrawals were as follows:

Date of Checks	Bank Account	Amount of Checks	Total
3/20/1961	Royal State Bank of N. Y.	$50,000	
		$50,000	$100,000
3/22/1961	Commercial Bank of North America	35,000	35,000
3/23/1961	Commercial Bank of North America	50,000	50,000
3/24/1961	Commercial Bank of North America	25,000	
		50,000	
		50,000	125,000

Date of Checks	Bank Account	Amount of Checks	Total
3/27/1961	Commercial Bank of North America	50,000	
		50,000	
		75,000	
		75,000	
			250,000
3/28/1961	Commercial Bank of North America	25,000	
		25,000	
		50,000	
		50,000	150,000
3/29/1961	Commercial Bank of North America	35,000	35,000
	Total Amount Withdrawn		$745,000

Substantially all of the monies so taken by Pagano were derived from the payments to the bankrupt made by the customers he brought in for merchandise ostensibly purchased from the bankrupt (57a). All checks issued to Pagano were signed by Weinberg at the request of Pagano (7a, 66a). On March 24, March 27 and March 28, 1961, instead of one large check, several "smaller" checks, none less than $25,000.00, aggregating the larger sum were prepared by Weinberg to Pagano's order in order to permit Pagano to withdraw every single dollar in collected funds standing to the credit of the bankrupt in its account at Commercial Bank of North America (41a, 69a, 70a).

Pagano appeared in the turnover proceeding and admitted receiving the sum of $745,000 from the bankrupt's funds during the ten-day period in question (6a, 7a, 8a), which he claimed were "loans" to him by the bankrupt (14a). He even introduced into evidence a series of promissory notes allegedly given by him at the time of the making of the various withdrawals which he characterized as

"loans" (21a, 24a, 29a, 30a, 33a; 34a). However, on cross-examination he refused to answer questions as to what he did with these monies or whether he still had them, claiming his privilege against self-incrimination, which was sustained (73a, 75a, 84a).

Prior to the turnover proceeding, Pagano was examined by the Receiver as a witness under Section 21a of the Bankruptcy Act, and the transcript of this examination was received in evidence in the turnover proceeding (51a). There he claimed his constitutional privilege against self-incrimination and refused to answer any material questions as to whether he received the monies, whether he had disbursed any of the monies, or whether he had any part of the monies in his possession (75a-84a). Altogether, he refused to answer thirty-two (32) questions put to him by the Receiver's attorney, based upon a claim of privilege against self-incrimination, which was sustained by the Referee.

The promissory notes claimed to have been made by Pagano to evidence the "loans" he was making from the bankrupt were found among the bankrupt's books of account, records and papers which were mysteriously delivered by persons unknown to the office of Weinberg's attorney on the eve of the trial of the turnover proceeding (7a, 19a, 22a, 23a). The bankrupt's books and records also were the subject matter of a separate turn-over proceeding commenced by the Receiver, after the books could not be found and the bankrupt's officers reported the books and records had "disappeared". The latter motion was withdrawn after various of the books of account and records and papers were delivered to the attorneys for the Receiver in open court (32a, 33a).

The promissory notes executed by Pagano were conveniently protruding from the pages of the bankrupt's cash disbursements book in which entries had been made describing the monies taken by Pagano as "loans and ex-

changes" (23a). Several pages of the cash disbursements book bearing the entries of these so-called "loans and exchanges" had been re-written by the bookkeeper after the date of original entry, at Weinberg's instructions, to change the original entries (26a-28a).

Weinberg testified that he had prepared the notes himself (19a) and that he had expected repayment from Pagano of the monies so taken in a "few days" or "after the weekend" (64a, 65a), but all of the notes which were put into evidence were payable three months after date (21a, 24a, 29a, 30a, 33a, 34a). Weinberg, who had charge of the granting of credit by the bankrupt and supervised its office, admitted that he made no inquiry as to Pagano's financial condition or ability to repay these "loans" during the period the monies were being withdrawn (41a, 42a). No security was sought or obtained. Weinberg just signed checks totaling $745,000.00 and permitted Pagano to drain the corporate treasury.

There were such glaring errors in these so-called promissory notes as to indicate their lack of genuineness. Thus, one of the notes did not even contain the name of a payee (45a); another note was made in the amount of $275,000. although the monies concededly withdrawn on that date and for which this note was made amounted to $250,000 (31a, 32a).

The first note, covering the $100,000 withdrawal from the bankrupt's account at Royal State Bank, was dated March 20, 1961, but was made payable at Commercial Bank of North America—where neither Pagano nor the bankrupt then had an account (21a). The bankrupt's account at Commercial Bank of North America was not opened until March 22, 1961. This fact alone demonstrated what became increasingly evident at the hearing, that all of the notes were prepared at the same time and after the events complained of, for the purpose of interposing a defense to the turnover motion.

Among the books and records delivered to the office of Weinberg's attorney was a file of bills payable for the month of March, 1961 to which were attached checks of the bankrupt, both signed and unsigned, in various amounts aggregating in execess of $400,000 (48a, 49a). The withdrawals by Pagano of the funds of the bankrupt, aggregating $745,000., during his ten-day "fling" in the month of March, 1961, rendered the bankrupt wholly unable to pay its due bills (96a). These withdrawals also rendered the bankrupt totally and hopelessly insolvent, both in the bankruptcy and equity definition of that term (96a, 97a).

Upon these facts, the Referee found that this $745,000 in cash was not received by Pagano pursuant to genuine and bona fide loans from the bankrupt and that his title to the monies was entirely without color of right. In so finding, the Referee found that the alleged "loan" nature of these withdrawals was wholly and completely incredible and rejected this fabrication in its entirety. He further rejected Weinberg's testimony that these monies were loaned to Pagano by the bankrupt and that Weinberg had excepted repayment thereof to the bankrupt in "a few days" or "over the weekend". The Referee then found that Pagano was in present possession or control of these monies aggregating $745,000 taken by him from the bankrupt, and that the Trustee was entitled to the immediate possession thereof as property of this estate (84a-89a).

The District Court on review determined that the Referee did not have summary jurisdiction to determine the Trustee's claim against Pagano, in effect giving full credence to the contention of Messrs. Pagano and Weinberg that the withdrawals by Pagano were loans (105a).

The District Court reversed the Referee's order without prejudice to a plenary suit by the trustee. An appeal to the United States Court of Appeals for the Second Circuit followed. The decision of the court was rendered

on April 25, 1962, unanimously reversing the order of the District Court and affirming and reinstating the order of the Referee directing petitioner to turn over the sum of $745,000 to the trustee in bankruptcy.

POINT I

Jurisdiction on a petition for writ of certiorari is discretionary and should be exercised sparingly and with great caution.

Application has been made to this Court by Joseph Pagano for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit. The jurisdiction of this Court is invoked by the petitioner under 28 U. S. C. § 1254(1), which provides that cases in the courts of appeals may be reviewed by this Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. The judgment of the Court of Appeals was entered on April 25, 1962.

Review of judgments, decrees and orders of the United States courts of appeal in proceedings under the Bankruptcy Act by this Court by writ of certiorari, is authorized by Section 24c of the Bankruptcy Act, 11 U. S. C. § 47c.

The power of determining *what* cases shall be brought up by writ of certiorari is vested solely in the Supreme Court of the United States. *Warner* v. *New Orleans*, 167 U. S. 467, 474 (1897).

The Court, on numerous occasions, has discussed in nature of the jurisdiction that is invoked herein. Thus, in *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916), this Court said:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance,

> or in order to secure uniformity of decision. *Lau Ow Bew, Petitioner*, 141 U. S. 583, 587; *In re Woods*, 143 U. S. 202; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58; *Amer. Const. Co.* v. *Jacksonville Ry.*, 148 U. S. 372, 383; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292, 296."

In fact, this Court has set down some of the criteria that it will consider in granting or disallowing a writ of certiorari. In Rule 19(1) of the Revised Rules of the Supreme Court of the United States, entitled "Considerations governing review on certiorari", it is said that review by writ of certiorari "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The primary reasons for the granting of certiorari, as indicated by the decisions of this Court and Rule 19, are conflict of decision between the various courts of appeal, need to settle an important question of federal law and conflict between the decision of the court below and the decisions of this Court.

This Court commonly has consented to act as arbiter between the various courts of appeals and to resolve any conflict of decision between the circuits. At the most recent term of this Court, certiorari was granted in numerous instances to resolve such conflict. See, *inter alia*, *St. Regis Paper Co.* v. *United States*, 368 U. S. 208 (1961); *United States* v. *Union Central Life Insurance Co.*, 368 U. S. 291 (1961); *DiBella* v. *United States*, 369 U. S. 121 (1962); *Simson* v. *Granquist*, 369 U. S. 38 (1962); and *Commissioner* v. *Bilder*, 369 U. S. 499 (1962).

Unusual or special circumstances must be present for the granting of a writ of certiorari. For instance, although there was no conflict of decision in the circuits in *Muncie Gear Works, Inc.* v. *Outboard, Marine & Manufacturing Co.*, 315 U. S. 759, 765, 766 (1942), the Court granted certiorari "in view of the questions presented and because the patent

dominates a substantial portion of an industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decision is unlikely."

Indeed, a writ of certiorari issued to settle an alleged conflict in decision between two courts of appeals will be dismissed as improvidently granted, if a later examination of the court discerns that no such conflict existed. See *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387 (1923); *Keller* v. *Adams Campbell Co.*, 264 U. S. 314, 319, 320 (1924); *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178, 179 (1938); see also *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70, 78, 79 (1955), and cases cited in footnote 2.

In the case at bar, there is no conflict of decision between the various courts of appeals on the question presented. There is no conflict between the decision of the court below and the decisions of this Court. Nor is there presented an important question of federal law which has not been, but should be, settled by this Court.

POINT II

The decision of the courts below that the Referee had summary jurisdiction does not conflict with the decisions of this Court.

The question of whether the Referee below had summary jurisdiction to determine the merits of the trustee's claim against petitioner has been at issue throughout these proceedings. At this juncture it is raised in a somewhat different form by the petitioner as his Point III where reference is now made to "the evidence that all the directors, officers and stockholders of the corporation consented to and approved of such loan."

At the very start of the turnover proceedings the petitioner objected to the summary jurisdiction of the Bank-

ruptcy Court. In accordance with the accepted procedure, the Referee held an immediate hearing on the question of the jurisdiction of the Bankruptcy Court (12a-39a), took the testimony of the petitioner and Weinberg on that issue and rendered his decision on June 9, 1961 (56a-59a) denying the objection to the jurisdiction of the Court.

The procedure followed by the Referee was in accordance with that laid down by this Court in *Harris* v. *Chamberlin*, 271 U. S. 191 (1925). There, the Court dealt with the question of the scope of the summary jurisdiction of the Bankruptcy Court when objection has been made by an adverse claimant to property sought to be recovered summarily, and said, 271 U. S. at pages 193, 194:

> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit (citations omitted). However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding." (citations omitted)

This Court established the following test to determine whether an adverse claim is substantial or merely colorable (271 U. S. at p. 195):

> "* * * we are of the opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room

> for controversy,' *Board of Education* v. *Leary*, [236 Fed. 521, 527 (8th Cir. 1916)], in matters either of fact or law; and it is not to be held colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit, and a mere pretense. Compare *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 295; and *Moore* v. *New York Cotton Exchange*, 270 U. S. 593."

A more recent pronouncement by this Court dealing with the scope of the summary jurisdiction of the Bankruptcy Court and the procedure to be followed when an objection has been made to that jurisdiction is found in *Cline* v. *Kaplan*, 323 U. S. 97, 98, 99 (1944).

Thus, the bankruptcy court cannot be ousted of jurisdiction unless the adverse party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy. The adverse claim must be real and substantial and not merely colorable. The adverse claim asserted in the case at bar, when subjected to the hard scrutiny of the trial court and judged by the standards and procedures established by this Court, is nothing more than a sham attempt to oust the court from jurisdiction.

Petitioner, who looted and stuffed into his pockets $745,000 in cash from the corporate treasury of the bankrupt, comes forward with the incredible contention that the moneys to which he helped himself were merely "borrowed". He acknowledged receiving the moneys and urged in his defense, the issuance of his promissory notes evidencing the so-called loan obligation, and the making of appropriate entries in the bankrupt's books and records.

The Referee's decision on the question of summary jurisdiction and his analysis of the defenses asserted is most revealing (58a, 59a):

> "This was in my opinion the most audacious raid on a treasury that I have ever encountered. To

make sure he emptied the bank account, Pagano on each occasion of making withdrawals, took several signed checks instead of one so that he could cash as many as the bank balance would permit.

"I completely disbelieve the testimony of Mr. Weinberg as to the execution of the promissory notes. He testified that he thought he could meet the bankrupt's debts on the week-end when he expected Pagano to repay the so-called loans, but when the notes turned up it was found that they were payable three months after their date.

"I am fully convinced that Mr. Weinberg committed the grossest perjury on the witness stand. The disappearance of the books, the denial by all parties as to their whereabouts, and their sudden and fortuitous appearance on the day of this trial, with the notes neatly peeking out of the ledger, demonstrates a contemptuous trifling with this Court.

"Even if the notes were executed when Weinberg says they were, they do not make Pagano a debtor nor his claim substantial. To put it boldly, he stole the money, he stripped the bankrupt of its assets, and to stand here now and say it was a pure business transaction, and to attempt to throw a mantle of respectability on the plainest of larcenies by calling it a loan, and at the same time refusing to answer the questions on the ground his answer would tend to incriminate him, simply insults the intelligence. The claim is frivolous, baseless and fictitious and is put forward in bad faith. If ever a plain case calling for the exercise of summary jurisdiction existed, this is that case. I hold that the Court has summary jurisdiction in regard to Pagano."

The claim now made that the so-called loans to petitioner were approved by the directors, officers and stockholders of the corporation is not supported by the facts. The directors of the corporation were the petitioner Pagano, Gussie Weinberg, the wife of Joseph Weinberg (father of Stanley Weinberg) and Terry Newman, the wife of David Newman. The two men were not officers and the

only other officer of the corporation was Stanley Weinberg, who was neither a director nor stockholder. The two women together with Pagano were the sole stockholders of the corporation. There was no evidence presented below and no finding by the Referee that the wives were nominees of their respective husbands or that they had approved of the so-called loans in question. Indeed, the record would show that they did not even know of these so-called loans.

Petitioner's further claim that the loan nature of this transaction is supported by documentary evidence, consisting of promissory notes that he signed and the entries in the books of the corporation, also is not supported by the record. What purported to be promissory notes issued by petitioner to evidence his withdrawal of monies and some of the books and records turned up in the possession of Weinberg's attorney the day before the hearing of the turnover motion, after all the bankrupt's books and records had been missing for more than a month and the receiver had commenced a separate turnover proceeding for their recovery (7a, 19a, 22a, 23a, 32a, 33a).

There were such discrepancies in the notes offered in evidence as to convince any trier of fact that these pieces of paper were prepared in contemplation of such a hearing to bolster the fabricated defense to the summary jurisdiction of the court. Indeed, Judge Friendly in his opinion on behalf of the Court of Appeals below, expressly found that the term of the notes was inconsistent with Weinberg's testimony as to a short term accommodation and that their contemporaneous delivery was dubious. (Petition for Writ, page 25). As to the entries in the bankrupt's books and records, the evidence introduced before the Referee indicated that the books had been rewritten at the instructions of Weinberg to reflect the transfers to Pagano and to denominate them as loans and exchanges.

The fact is that the Referee, who observed and listened to the testimony of these illustrious businessmen, deter-

mined that both witnesses were committing perjury and ruled that the claim as to the loan nature of the transaction "was frivolous, baseless and fictitious and [was] put forward in bad faith" (59a). The Referee's decision and determination and that of the Court of Appeals below were clearly correct. The Bankruptcy Court cannot and should not be ousted of its jurisdiction by the mere assertion of a fictitious, frivolous, and baseless defense put forward in bad faith. The decision below is in complete accord with the decisions of this Court and no issue is presented of sufficient import to require the granting of the petition.

POINT III

The turnover order was properly granted with respect to petitioner and is in conformity with the decisions of this Court.

The Referee, after hearing all of the evidence and observing the witnesses, rendered a decision rejecting the fabricated defense of petitioner and entered an order directing him to turn over and surrender to the trustee the sum of $745,000, representing property of the bankrupt in his possession at the time of the entry of the order and taken by Pagano without color of right or title. Pagano, who claimed he received this money as a loan, refused to answer any questions as to present possession or disposition of this fund on the grounds that a truthful answer would tend to incriminate him.

The test for the burden of proof required of the moving party in a turnover proceeding was established by this Court in *Oriel* v. *Russell*, 278 U. S. 358 (1929):

> "We think a proceeding for a turnover order in bankruptcy is one the right to which should be supported by clear and convincing evidence. The charge upon which the order is asked is * * * equiva-

lent to one of fraud, and must be established by the same kind of evidence required in a case of fraud in a court of equity. A mere preponderance of evidence in such a case is not enough." 278 U. S. at 362.

Judged by the standard of "clear and convincing" proof, the granting of the turnover order against petitioner was the only proper and just result that could have been reached in the proceeding. When such order is examined in the light of the landmark decision of this Court in *Maggio* v. *Zeitz*, 333 U. S. 56 (1948), which sets the standards by which all turnover orders are now to be judged, the propriety of the Referee's determination is demonstrated.

In *Maggio* v. *Zeitz, supra*, this Court examined the dual stage turnover proceeding in the light of its previous decisions and the practice that had developed.

> "The proceeding which leads to commitment consists of two separate stages which easily become out-of-joint because the defense to the second often in substance is an effort to relitigate, perhaps before another judge, the issue supposed to have been settled in the first, and because while the burden of proof rests on the trustee, frequently evidence of the facts is entirely in possession of his adversary, the bankrupt, who is advantaged by nondisclosure." 333 U. S. at page 60.

The evidence below had established that towards the end of 1941 a shortage occurred in the bankrupt's stock of merchandise, and that Maggio personally took possession of the corporation's vanishing assets. The Court pointed out that "* * * this abstraction by Maggio occurred several months before bankruptcy and over a year before a turnover order was applied for. The only evidence that the goods then were in the possession or control of Maggio was the proof of his onetime possession supplemented by a 'presumption' that in the absence of a credible explanation by Maggio of his disposition of the goods, he

continues in possession of them or their proceeds." 333 U. S. at 60.

The problem presented on certiorari was that the Second Circuit felt constrained by its previous decisions to adhere to the presumption of continued possession and affirmed the turnover order; then, in the contempt proceedings, even though convinced that Maggio in fact did not retain the goods or their proceeds up to the time of the turnover proceedings, the Court considered the turnover order *res judicata,* so that the apparent injustice could not be corrected on review of the contempt order.

This Court, per Justice Jackson, reviewed the nature and history of turnover proceedings:

> "The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity." 333 U. S. at page 61.
>
> * * *
>
> "* * * courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by 'clear and convincing evidence,' the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act. *Oriel* v. *Russell,* 278 U. S. 358; *Cooper* v. *Dasher,* 290 U. S. 106; see also *Farmers & Mechanics National Bank* v. *Wilkinson,* 266 U. S. 503." 333 U. S. at 62, 63.

The Court then turned to the burden of proof to be imposed upon the trustee seeking a turnover order and examined the so-called presumption of continued possession applied rigidly by some lower courts.

"Turnover orders should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as one-time possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. No rule of law requires that judgment be thus fettered; nor has this court ever so prescribed. Of course, deference is due to the trial court's findings of fact, as prescribed by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law. In any event, rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing any such presumption to override reason when reviewing a turnover order.

"We are well aware that these generalities do little to solve concrete issues. The latter can be resolved only by the sound sense and good judgment of trial courts, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement." 333 U. S. at pages 66, 67.

The balance of the opinion deals with the nature of the contempt proceedings to enforce a turnover order and the burden of proof and scope of review thereon, not here pertinent. Indeed, any issues sought to be raised by petitioner at this injuncture as to the enforcement of the turnover order are premature. The only question presented is whether the order was properly granted; the court of appeals below, in reinstating the Referee's order, determined from the whole record that the order was realistic and just.

In *Maggio* v. *Zeitz, supra*, this Court struck down the rigid application of the so-called presumption of continued possession and adopted instead a rule of reason and com-

mon sense. Numerous decisions on the Circuit Court and District Court level have followed in which the Federal courts have wrestled with the standards to be applied in accordance with the dictates of this Court in *Maggio* v. *Zeitz.*

The common theme of all cases since *Maggio* v. *Zeitz* is that there must be some showing by the trustee of present possession by the adverse party of the property sought to be recovered. The presumption of continued possession has not been discarded, but rather the courts have modified the rigidity of its application; no longer can a court close its eyes in applying this presumption. Instead all the attendant facts bearing upon the respondent's ability to comply with the order are relevant and material to the court's determination.

Wherever a turnover order has been denied, the denial has been predicated on a weakening of the presumption of continued possession by the passage of time and upon a failure of the moving party to show by "clear and convincing" proof that the respondent remains in possession of the property sought to be recovered. But in each instance the finding that the respondent no longer has possession is predicated in part upon the respondent's own testimony as to the disposition of the property sought to be recovered, or his present financial condition and means of living and all other relevant information as to his present inability to comply. See, for instance, In re *Milgrom,* 94 F. Supp. 762 (D.C.S.D.N.Y. 1950); In re *Vitemb,* 120 F. Supp. 830 (D.C.S.D. Tex. 1954).

Such is not the case at bar. Pagano himself has acknowledged receipt of $745,000.00 in cash not long prior to the hearing, but claims that these moneys were merely borrowed by him from the corporation. However, when he was questioned as to the disposition of this heaping bundle of bills, as to his present possession of the funds and as to like matters bearing upon his ability to comply with the

turnover order, he refused to answer upon the grounds that a truthful answer to the questions would tend to incriminate him. He offered no explanation whatsoever of what happened to this money. Under the circumstances, the Court had no choice but to grant the motion, possession having been shown not much more than one month prior to the institution of the turnover proceedings. Such determination was in complete conformity with the letter and spirit of this court's decision in *Maggio* v. *Zeitz*, 333 U. S. 56 (1948).

POINT IV

Inferences may be properly drawn against petitioner from his failure to testify as to facts within his control.

Petitioner urges for the first time in his Point I the absence of evidence that he has the power to comply with the turnover order or that he has present possession of all or any part of this large sum of money. He also urges as his Point II whether he had the burden to show that he no longer had possession of any part of the monies, notwithstanding his claim of a constitutional privilege against self-incriminaton.

These contentions are related. There is no question that the constitutional protection of the Fifth Amendment is available to a witness in a bankruptcy proceeding. *Counselmen* v. *Hitchcock*, 142 U. S. 547, 562 (1892); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72-73 (1920). However, the fact that Pagano may have been justified in availing himself of his constitutional privilege is no answer to the propriety of the entry of an order against him.

Whereas, under examination pursuant to Section 21a of the Bankruptcy Act by the receiver, Pagano consistently claimed his constitutional privilege with respect to

all material questions, including receipt of the monies, when it came to the hearing on the turnover motion he elected to take the stand, testify in his own behalf and offer up the frothy confection that the withdrawal of this $745,000.00 in cash was a loan to him. The bankrupt, of course, was not a money lending institution, but was engaged in the wholesale meat and poultry business. Upon cross-examination with regard to present possession of the monies and the disposition of the same—material issues, of course, to the turnover proceeding—petitioner claimed his constitutional privilege against self-incrimination.

This Court, in *Brown* v. *United States*, 356 U. S. 148 (1948), affirming 234 F. 2d 140 (6 Cir. 1956), dealt with a denaturalization proceeding, a civil cause, in which the defendant testified in her own behalf. On cross-examination she pleaded the privilege against self-incrimination as to questions as to whether she was a member of the Communist party, one of the issues of the proceeding. The Court directed her to answer and held her in contempt when she refused. The Court of Appeals for the Sixth Circuit affirmed—and so did this divided Court, per Frankfurter, J., who stated:

> "• • • • when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-

> disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States*, 347 U. S. 62, 65. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail on the balance of considerations determining the scope and limits of the privilege against self-incrimination. Petitioner, as a party to the suit, was a voluntary witness. She could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination." 356 U. S. at pages 154-156.

In the court below, the Circuit Judge in his opinion, 234 F. 2d at page 146, commented:

> "To hold that a defendant, under the claim of protection against self-incrimination, may tell his full, self-serving story without any test of its truth by cross-examination is to make a mockery of the judicial proceeding."

The question of waiver of the constitutional privilege was presented in *United States* v. *St. Pierre*, 132 F. 2d 837 (2d Cir. 1942), a criminal proceeding to punish a witness for contempt predicated upon his refusal to answer questions before a Grand Jury. The Court, per Learned Hand, J., stated, 132 F. 2d at pages 839, 840:

> "The law in this country * * * rests upon the obvious injustice of allowing a witness, who need not have spoken at all, to decide how far he will disclose what he has chosen to tell in part, and how far he will refuse to let his veracity be tested by cross-questioning. In adversary cases, it is hard to see how a trial could go on, if this were allowed. * * * It must be conceded that the privilege is to suppress the truth, but that does not mean it is a privilege to

> garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition."

While the propriety of petitioner's claim of the Constitutional privilege was not contested below, nevertheless it can be seen that the very substantial question of a waiver may have been present, reflecting upon the justiciability at this juncture of contentions involving petitioner's claim of the Constitutional privilege. In any event, petitioner's failure to testify is most damaging to him on the issues raised by the turnover motion, which itself is not a criminal proceeding. It was no answer to the question of whether he still had the monies, or to the question of what disposition he made of the monies for petitioner to plead his Constitutional privilege. It was incumbent upon petitioner, from the evidence in his possession, to rebut the evidence contained in his own admissions of receipt of the monies.

There is a substantial body of opinion that adverse inferences may be drawn by the trier of fact in a civil proceeding from the claim of the Constitutional privilege. While Professor Wigmore in his treatise on evidence [VIII, *Wigmore, Evidence*, § 2272, p. 439 (4th Ed. McNaughton, Rev. 1961)] indicates that the cases are confused, he adds, in footnote No. 14:

> "The inference seems to be allowed with least reluctance in cases where the party claiming the privilege has an affirmative burden in the cause, where he has exclusive access to information which would, if favorable to him, dispute evidence adverse to him already before the tribunal, or where the inference is used to buttress other evidence."

There are numerous cases with respect to the inferences to be drawn from the failure of a party to a civil proceeding to rebut unfavorable evidence, either by refusal to take the stand and testify or by a claim of the constitutional priv-

ilege. For instance, in *Hansel* v. *Furnell*, 1 F. 2d 266 (6 Cir. 1924), a civil action, the defendants were charged with the commission of various criminal acts but did not take the witness stand to deny the truth of the charges. The court commented 1 F. 2d at p. 273:

> "This is a civil action, and the failure of a party to testify to facts peculiarly within his knowledge, or to call witnesses within the jurisdiction of the court to contradict evidence of conversations had with them or in their presence, is a circumstance that cannot be overlooked."

The drawing of such inferences has been approved by this Court in *Mammoth Oil Co.* v. *United States*, 275 U. S. 13 (1927) where it was stated as follows:

> "But the failure of Sinclair to testify stands on a different basis. Having introduced evidence which, uncontradicted and unexplained, was sufficient to sustain its charge, the United States was not required to call the principal representative of the company. His silence makes strongly against the company. It is as if he personally held the lease, were defendant, and failed to testify. The guiding considerations by which the proper significance of such silence is to be ascertained were well stated by Chief Justice Shaw in the celebrated case of *Commonwealth* v. *Webster*, 5 Cush. 295,316: 'Where, for instance, probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered—though not alone entitled to such weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of the facts and circumstances as they existed, and show, if such were the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the

proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution. While Sinclair's failure to testify cannot properly be held to supply any fact not reasonably supported by the substantive evidence in the case (*Northern Railway Company v. Page*, 274 U. S. 65, 74), it justly may be inferred that he was not in a position to combat or explain away any fact or circumstance so supported by evidence and material to the Government's case. (Citations omitted.)" 275 U. S. at pages 51-53.

In the case at bar the petitioner has withheld the evidence favorable to him upon his claim of the Constitutional privilege. In a civil case, the New York courts have consistently held that the trier of facts may draw an inference from the refusal of a witness to testify under claim of privilege. *Bradley* v. *O'Hare*, 2 A. D. 2d 436, 156 N. Y. S. 2d 533 (1st Dept. 1956). See, also, *Levine* v. *Bornstein*, 13 Misc. 2d 161, 174 N. Y. S. 2d 574 (Sup. Kings 1958); *Haywood* v. *Craig Colony*, 7 A. D. 2d 69, 180 N. Y. S. 2d 701, 706 (dissent) (4th Dept. 1958). Other state courts permit a trier of fact in a civil case to draw an inference from the refusal of a party to testify under a claim of Constitutional privilege. *Ikeda* v. *Curtis*, 43 Wash. 2d 449, 261 P. 2d 684, 689, 690 (1953); *Fross* v. *Wotton*, 3 Cal. 2d 384, 44 P. 2d 350, 354 (1935).

It cannot be stressed too strongly that petitioner has offered no explanation whatever with respect to the disposition of the moneys, with respect to his present possession of the same or with respect to his ability to comply with the turnover order. Faced with petitioner's recalcitrance and refusal to offer any explanation, credible or otherwise, the court below had no choice but to assume and infer that the moneys which came into his possession during the short ten day period of March 20 through March 29, 1961,

$745,000.00 in cash, continued in his possession little more than a month later at the time the turnover proceedings were commenced on May 5, 1961, and further continued in his possession until the entry of the order on July 24, 1961. Whether he still has the monies is a matter to be determined in appropriate proceedings.

Under the proof of this case, it was incumbent upon Pagano to rebut the presumption or the inference of continued possession of the $745,000 to which he helped himself, after he, himself, acknowledged receipt of the moneys. He need only have testified fully and truthfully as to what disposition he made of these moneys and as to whether or not he still had the moneys, or any part thereof, in his possession and could comply with the turnover order. Setting aside the question of waiver, he may have been justified in refusing to testify on the grounds of self-incrimination for fear of criminal prosecution but, by his very failure to testify, he failed to rebut the presumption or inference of continued possession which arises from the evidence upon which the Referee's determination was based—his own testimony of receipt of this $745,000 in cash.

There is a duty or burden imposed upon the respondent when property which is part of the bankrupt estate is traced into his hands to come forward with credible explanation of what became of it. In re *H. Magen Co.*, 10 F. 2d 91 (2d Cir. 1925); In re *Chorkin*, 249 Fed. 342 (2d Cir. 1918). A mere denial of possession is "too bald and indefinite to have any persuasive force." In re *Stavrakn*, 174 Fed. 330, 333 (2d Cir. 1909).

Petitioner declined to testify at his own risk. In *Sheinman* v. *Chalmers*, 33 F. 2d 902, 904 (3d Cir. 1929), the Court said:

> "* * * it is true the burden of proof never shifts from the party having the affirmative of an issue. There it rests, at least until he has made out a prima

facie case. Then the burden, not of proving the proponent's case but of explaining or rebutting it, shifts to the other party. This burden he may assume or ignore as he may wish, but he will suffer the consequences of not taking it up and carrying it. (Citations omitted.)

> "What the referee plainly meant by the words 'the burden shifts' was that the trustee had proved his case against the bankrupt and that it would stand unless the bankrupt should assume the burden of explaining or contradicting it. Failing in that, the trustee's proofs would stand uncontradicted. * * *"

That petitioner declined to testify because of the possibility of self-incrimination makes no difference. In *Dittmar* v. *Michelson,* 281 Fed. 116, 117 (3d Cir. 1922), cert. den. 260 U. S. 738 (1922), the bankrupt, defending a turnover motion brought by his trustee, was asked what he had done with the cash received from certain checks and declined to answer on the ground that his answer might tend to incriminate him. He stated he lost a great deal of money, but when asked how, he again declined to answer on the grounds of self-incrimination. The Court commented (281 Fed. at 117):

> "The possession of these large sums of money and property was within so recent a period before bankruptcy as would enable an honest trader to tell what had become of them. * * * While, of course, a witness may properly decline to incriminate himself, yet the fact that crime may make it more difficult and possibly hazardous to tell what became of assets, does not destroy the presumption of continued possession of assets, whose disappearance is not accounted for."

See also *Kattelman* v. *Madden,* 88 F. 2d 858, 861 (8th Cir. 1937).

The trustee has demonstrated by clear and convincing evidence that petitioner received the money. Indeed, petitioner himself acknowledged receipt of the $745,000 in cash.

Petitioner's refusal to testify was more eloquent than any testimony the trustee could offer on the heels of Pagano's earlier acknowledgment he had received the $745,000 at issue. The Referee's order directing petitioner to return the $745,000.00 taken by him was properly granted and is in complete accord with the decisions of this Court.

The fact remains that petitioner offered no testimony or evidence whatsoever on the key issues of his disposition of this large sum of money and his present possession of the same at the time of the hearing. He did not see fit merely to plead his Constitutional privilege. He himself assumed the risk of taking the stand and offering a bald-faced fabrication, that the monies he took were borrowed by him. Once he took the stand and was pressed on cross-examination as to his present possession and as to his disposition of the monies, he then fell back upon his Constitutional privilege. Thus, it is not correct to say that there is an absence of evidence that the petitioner has the power to comply with the turnover order or that he had present possession at the time the order was granted. Such evidence as would refute the trustee's contention was completely within petitioner's control. He could have refuted this essential element of the turnover proceeding, after his own testimony placed the money in his hands, but he did not.

Upon the facts at issue no substantial question of Federal law is presented which has not been, but should be settled, by this Court. This Court has already ruled upon the propriety of drawing inferences adverse to a party from his failure to dispute, from information in his possession, evidence adverse to him and already before the tribunal. *Mammoth Oil Co.* v. *United States*, 275 U. S. 13 (1927); *Clifton* v. *United States*, 45 U. S. (4 How.) 242, 247 (1846). That petitioner claimed his Constitutional privilege instead of refusing to testify at all adds nothing to the issue sought to be reviewed in this Court. There

has been no departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's power of supervision. The instant application is merely another step in petitioner's calculated defense to enforcement of the turnover order. He seeks by delay to cover his tracks and let the scent from the $745,000 grow cold.

CONCLUSION

It is respectfully submitted that the petitioner has shown no reason for the granting of the petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted,

HAROLD L. LIPTON,
Attorney for Respondent.

Of Counsel to:
BOOTH, LIPTON & LIPTON,
Attorneys for Trustee-Respondent,
292 Madison Avenue,
New York 17, N. Y.

Of Counsel on Brief:
EDGAR H. BOOTH,
292 Madison Avenue,
New York 17, N. Y.